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No. 00-1464

In the Supreme Court of the United States

PHELPS DODGE CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF FOR THE UNITED STATES IN OPPOSITION

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21 pp

QUESTION PRESENTED

Whether an interlocutory decision of the Arizona Supreme Court establishing a rule of state water law to be applied in an ongoing general stream adjudication effected a judicial taking of petitioners' property without just compensation in violation of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the Arizona Supreme Court (Pet. App. A1-A34) is reported at 9 P.3d 1069. The opinion of the Superior Court of the State of Arizona (Pet. App. B1-B71) is unreported. An earlier opinion of the Arizona Supreme Court (Pet. App. C1-C30) is reported at 857 P.2d 1236. An earlier opinion of the Superior Court of the State of Arizona (Pet. App. F1-F30) is unreported.

JURISDICTION

The judgment of the Arizona Supreme Court was entered on September 22, 2000. A motion for reconsideration was denied on December 19, 2000 (Pet. App. I1-I2). The petition for a writ of certiorari was filed on

March 19, 2001. The jurisdiction of this Court is sought to be invoked under 28 U.S.C. 1257(a). As discussed below, however (see pp. 8-10, *infra*), this Court does not have jurisdiction because the Arizona Supreme Court's interlocutory ruling is not a "[f]inal judgment[] or decree[]" within the meaning of 28 U.S.C. 1257(a).

STATEMENT

In 1990, the Arizona Supreme Court certified six issues for interlocutory review in order to aid the state trial court in resolving the claims of competing parties in the ongoing general stream adjudication of the Gila River System. Pet. App. D1-D12. In addressing the second of those six issues, the Arizona Supreme Court has now affirmed a trial court order defining "subflow," a term of art in Arizona water law. *Id.* at A1-A34. Petitioners argue that the state court's decision warrants review by this Court because it effected a judicial taking of property without just compensation in violation of the Fifth Amendment.

1. This case arises from a general stream adjudication brought under Arizona law to determine all rights to use waters of the Gila River System in Arizona. See generally Ariz. Rev. Stat. Ann. §§ 45-251 to 45-264 (West 1994 & Supp. 2000) (establishing procedures for such river system adjudications). The history of the adjudication is described in *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 557-559 (1983); *In re Rights to the Use of the Gila River*, 830 P.2d 442, 444-445 (Ariz. 1992); and *United States* v. *Superior Court*, 697 P.2d 658, 663-664 (Ariz. 1985) (en banc).[1]

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[1] This Court recently denied a petition for certiorari seeking review of a different interlocutory opinion of the Arizona Supreme Court in the same adjudication. See *In re the General Adjudication of All Rights to Use Water in the Gila River System and*

The United States is participating in the adjudication pursuant to the McCarran Amendment, 43 U.S.C. 666. Under the doctrine of federally reserved water rights, see, *e.g.*, *United States* v. *New Mexico*, 438 U.S. 696, 698 (1978); *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976); *Arizona* v. *California*, 373 U.S. 546, 599-600 (1963); *Winters* v. *United States*, 207 U.S. 564, 575-578 (1908), the United States claims rights to the use of certain waters in the Gila River System on its own behalf and as trustee for several Indian reservations. The United States also claims water rights arising under Arizona law, as well as rights confirmed by the 1935 Globe Equity Decree entered by the United States District Court for the District of Arizona. See *United States* v. *Gila Valley Irrigation Dist.*, 961 F.2d 1432 (9th Cir. 1992) (action to enforce the 1935 decree).

2. Arizona law generally classifies water into three categories: (1) surface water, such as lakes, ponds, rivers, and streams, including underground streams; (2) "subflow" groundwater that is closely connected to surface water in hydrology and is considered incidental thereto; and (3) "percolating" groundwater that is not so closely connected to surface water. See Pet. App. A6-A8, C8-C14. Rights to water within the first two categories are governed by the state-law doctrine of "prior appropriation," while rights to percolating groundwater are subject to the state-law doctrine of "reasonable use." See *ibid.*; Ariz. Rev. Stat. Ann. § 45-141.A (West 1994 & Supp. 2000). Under the doctrine of prior appropriation, "the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity

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Source, 989 P.2d 739 (Ariz. 1999) (en banc), cert. denied, 530 U.S. 1250 (2000) (Nos. 99-1388 & 99-1389).

of water against all claimants junior to him in point of time." *Arizona* v. *California*, 373 U.S. at 555. Under the doctrine of reasonable use, a landowner may capture as much of the groundwater underlying his property as can be used on the overlying land, regardless of the effect on the quantity of water available to others. See *Bristor* v. *Cheatham*, 255 P.2d 173, 179-180 (Ariz. 1953).

3. In 1988, the Arizona superior court entered an order that addressed several aspects of the relationship between groundwater and surface water. See Pet. App. F1-F32; see also *id.* at G1-G4 (setting forth the questions that the superior court proposed to address). The court considered the circumstances under which wells used to draw groundwater from the portion of a stream basin known as the "younger alluvium"[2] would be presumed to withdraw subflow. The court stated that "[a]s to wells located in or close to that younger alluvium," that presumption would apply whenever

> the volume of stream depletion would reach 50% or more of the total volume pumped during one growing season for agricultural wells or during a typical cycle of pumpage for industrial, municipal, mining, or other uses, assuming in all instances and for all types of use that the period of withdrawal is equivalent to 90 days of continuous pumping for purposes of technical calculation.

Id. at F14.

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[2] The "younger alluvium" is the portion of a stream basin nearest the stream itself, made of deposits dating from approximately the last 10,000 years. See Pet. App. A5 n.2, B11-B12, B19, B21-B22.

4. In response to petitions for review filed by numerous parties, the Arizona Supreme Court in 1990 certified six issues for interlocutory appeal. See Pet. App. D1-D17; see also *id.* at E1-E10 (establishing procedures for interlocutory appeals in this adjudication). The second of those certified questions was whether the trial court's test for subflow—termed the "50%/90 day" test—was erroneous. See *id.* at D2.

In a decision commonly known as *Gila River II*, the Arizona Supreme Court vacated the portion of the superior court's order establishing the "50%/90 day" test for subflow. See Pet. App. C1-C30. The Arizona Supreme Court perceive[d] "[its] role as interpreting" its 1931 decision in *Maricopa County Municipal Water Conservation District No. 1* v. *Southwest Cotton Co.*, 4 P.2d 369 (Ariz. 1931), which established that subflow constitutes "part of the surface stream itself" and thus is appropriable under the relevant statutes in the same way as surface water. Pet. App. C13, C16 (quoting *Southwest Cotton*, 4 P.2d at 380). The court recognized that *Southwest Cotton* had established the following test:

> [T]he test is always the same: *Does drawing off the subsurface water tend to diminish appreciably and directly the flow of the surface stream?* If it does, it is subflow, and subject to the same rules of appropriation as the surface stream itself; if it does not, then, although it may originally come from the waters of such stream, it is not, strictly speaking, a part thereof, but is subject to the rules applying to percolating waters.

Id. at C13-C14 (quoting *Southwest Cotton*, 4 P.2d at 380-381); see also *id.* at C17, C26 (recognizing that

Southwest Cotton established a "direct and appreciable diminution" test for subflow).

The Arizona Supreme Court held that the superior court's "50%/90 day" test did not comport with the definition of subflow set forth in *Southwest Cotton*. Pet. App. C16-C24. The court explained:

> Whether a well is pumping subflow does not turn on whether it depletes a stream by some particular amount in a given period of time. * * * [I]t turns on whether the well is pumping water that is more closely associated with the stream than with the surrounding alluvium. For example, comparison of such characteristics as elevation, gradient, and perhaps chemical makeup can be made. Flow direction can be an indicator.

Id. at C24. The court remanded the case to allow the superior court to determine more appropriate "criteria for separating appropriable subflow from percolating groundwater." *Id.* at C30.

5. On remand, the superior court conducted substantial further proceedings, including numerous evidentiary hearings in which hundreds of exhibits were introduced, as well as a tour of multiple sites in the San Pedro River Basin (a portion of the larger Gila River Basin). See Pet. App. B2-B8. The court then issued an order applying the criteria set forth in *Gila River II*:

> After consideration of flow direction, water level elevation, the gradation of water levels over a stream reach, the chemical composition if available, and lack of hydraulic pressure from tributary aquifer and basin fill recharge which is perpendicular to stream and "subflow" direction, the Court finds the most accurate of all the markers is the edge of the saturated floodplain Holocene alluvium.

Id. at B54. Thus, the trial court adopted the "saturated floodplain Holocene alluvium" as the subflow zone. *Id.* at B54-B58. Any well pumping part of its water from that zone would be included within the adjudication of rights to Gila River System water. See *id.* at B58-B63.

6. On further interlocutory review, the Arizona Supreme Court affirmed the superior court's order. See Pet. App. A1-A34. After examining *Southwest Cotton* and *Gila River II*, see *id.* at A8-A12, the court found that the superior court had properly "based its ruling on evaluation of the pertinent factors * * * for delineating the subflow zone," *id.* at A14. The Arizona Supreme Court concluded that

> [u]nlike the 50%/90 day test we rejected in *Gila River II*, the trial court's order after remand is not arbitrary. Nor does it include tributary aquifers in its definition of subflow. Although the saturated floodplain Holocene alluvium may appear to be inconsistent with the "narrow concept" of subflow described in *Gila River II*, and suggested in *Southwest Cotton*, we reject the argument that the trial court's findings and conclusions, as a matter of law, so violate the fundamental principles of those cases that they cannot stand. Nor does affirmance of the trial court's order require us to overrule *Gila River II* or *Southwest Cotton*, and we do not do so.

Id. at A25-A26 (citations omitted). The court also stated that "[t]he criteria that the trial court articulated were elaborations of, but consistent with, the more general criteria set forth in *Gila River II*." *Id.* at A26.

Finally, the Arizona Supreme Court rejected the contention that the superior court's order "amount[ed] to an unconstitutional taking of [groundwater users'] private property, in violation of the Fifth Amendment."

Pet. App. A33. The court explained that "[i]n remanding this matter in *Gila River II* for the trial court to establish an evidentiary and principled basis for differentiating appropriable subflow from percolating groundwater, we implicitly rejected the groundwater users' identical argument in that case." *Ibid.* The court also observed that under Arizona law, "a well owner does not own underground water," and "landowners have 'no legally recognized property right in potential, future groundwater use.'" *Ibid.* (quoting *In re Rights to the Use of the Gila River*, 830 P.2d at 451).

ARGUMENT

The Arizona Supreme Court's interlocutory decision is not a "[f]inal judgment[] or decree[]" within the meaning of 28 U.S.C. 1257(a), the jurisdictional provision that governs this Court's review of state court decisions. In any event, the Arizona Supreme Court's ruling did not effect a taking of private property, and the decision raises no federal question of recurring significance. The petition for a writ of certiorari should therefore be denied.

1. This Court has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State * * * where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of * * * the United States." 28 U.S.C. 1257(a). Section 1257(a) "establishes a firm final judgment rule." *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 81 (1997). "To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps

therein.'" *Ibid.* (quoting *Market Street Ry.* v. *Railroad Comm'n*, 324 U.S. 548, 551 (1945)). Because the Arizona Supreme Court's interlocutory ruling is not a "[f]inal judgment[] or decree[]" within the meaning of Section 1257(a), this Court lacks jurisdiction to review the state court's decision.

a. Like the order at issue in *Jefferson*, the Arizona Supreme Court's decision in this case is an interlocutory ruling that arose from the state court's decision to certify certain legal questions for preliminary determination. Compare *Jefferson*, 522 U.S. at 81, with Pet. App. A4-A5, D1-D2. The Arizona Supreme Court's decision does not terminate the litigation or resolve any of the claims raised therein. Rather, it provides prospective guidance to the superior court on matters of Arizona law. The Arizona Supreme Court's decision is an "intermediate step[]" and not the "final word" on water rights claims in the Gila River Basin. *Jefferson*, 522 U.S. at 81.

b. In *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), this Court identified four categories of state decisions that are deemed effectively final, for purposes of Section 1257(a), notwithstanding the prospect of further proceedings in the lower state courts. The Arizona Supreme Court's decision does not fall within any of those categories.

The only conceivably applicable *Cox Broadcasting* category is the second, which encompasses "cases * * * in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings."[3] 420 U.S. at 480. That exception

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[3] The other three categories of state court decisions that can be final under Section 1257(a) notwithstanding the pendency of

addresses situations when "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question." *Id.* at 478. In the instant case, however, the outcome of the proceedings on remand is scarcely foreordained. As in *Jefferson*, petitioners' takings claim may become moot as the litigation progresses if the superior court determines their water rights in a manner that petitioners find satisfactory. See 522 U.S. at 77, 82.

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proceedings on remand are (1) "cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained," 420 U.S. at 479; (2) "situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case," *id.* at 481; and (3) "situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come," *id.* at 482-483. Those categories are inapplicable because: (1) even if this Court were to review the decision of the Arizona Supreme Court, substantial further state-court litigation would be needed to adjudicate parties' actual water rights, regardless of this Court's decision; (2) if petitioners are dissatisfied with the state courts' ultimate determination of their water rights, there should be no impediment to petitioners' re-assertion of their constitutional claim at the conclusion of the state-court proceedings; and (3) reversal of the Arizona Supreme Court's decision on the takings issue would not be preclusive of any further litigation.

2. Even if the decision of the Arizona Supreme Court were final, that decision would not warrant the Court's review. Under Arizona law, petitioners had no property interest that the state court's decision could have taken. Even if petitioners possessed such a property right, this case would be a poor vehicle for the Court's consideration of the question whether, and under what circumstances, a state court's elaboration of state property law principles effects a taking requiring the payment of just compensation. In any event, the decision of the Arizona Supreme Court reflects no dramatic departure from that court's precedents.

a. The gravamen of petitioners' takings claim is that the decision below "transform[ed] vast quantities of what had formerly been percolating g[r]oundwater into subflow that is suddenly subject to appropriation." Pet. 12. The Arizona Supreme Court has long held, however, that under state law, groundwater users have no property interest in "potential, future groundwater use." Pet. App. A33 (quoting *In re Rights to the Use of the Gila River*, 830 P.2d at 451); see also *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992) (recognizing that property rights are ordinarily determined by reference to state law). Petitioners' takings claim must fail for that reason alone.

In *Town of Chino Valley* v. *City of Prescott*, 638 P.2d 1324 (Ariz. 1981) (in banc), appeal dismissed, 457 U.S. 1101 (1982), the Arizona Supreme Court considered a challenge by a groundwater user to Arizona's newly enacted Groundwater Management Act of 1980. See *id.* at 1325 & n.*. One of the groundwater user's claims was that the statute took property without just compensation. See *id.* at 1326. In rejecting that contention, the Arizona Supreme Court squarely held "that there is no right of ownership of groundwater in Arizona prior

to its capture and withdrawal from the common supply and that the right of the owner of the overlying land is simply to the usufruct of the water." *Id.* at 1328. Arizona courts since *Town of Chino Valley* have consistently recognized that overlying landowners do not own subsurface percolating groundwater prior to its capture and withdrawal. See, *e.g.*, *In re Rights to the Use of the Gila River*, 830 P.2d at 451; *Aikins* v. *Arizona Dep't of Water Res.*, 743 P.2d 946, 950-951 (Ariz. App. 1987). Federal courts have also recognized that principle of Arizona law. See *Cherry* v. *Steiner*, 543 F. Supp. 1270, 1277-1278 (D. Ariz. 1982), aff'd, 716 F.2d 687, 691-692 & n.1 (9th Cir. 1983), cert. denied, 466 U.S. 931 (1984). Although petitioners argue that *Town of Chino Valley* "merely acknowledges the fact that the Legislature may *prospectively* regulate groundwater uses" (Pet. 21), that characterization simply ignores the relevant portion of the opinion.[4]

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[4] Petitioners also contend (Pet. 22-24) that the Groundwater Management Act—the statute at issue in *Town of Chino Valley*—creates statutory rights to the use of groundwater and that those rights have been taken by the Arizona Supreme Court's interlocutory ruling in this case. That claim lacks merit. The Groundwater Management Act regulates the manner in which groundwater is managed once it has been identified, but it does not speak to the question whether particular water *is* groundwater (as distinct from surface water or subflow). Indeed, the statute specifically states that it "shall not be construed to affect decreed and appropriative water rights. Nothing in this chapter shall be construed to affect the definition of surface water in [Ariz. Rev. Stat. Ann.] § 45-101 and the definition of water subject to appropriation in § 45-141." Ariz. Rev. Stat. Ann. § 45-451.B (West 1994 & Supp. 2000). The statute is thus irrelevant to petitioners' claim that the Arizona Supreme Court has taken their property by defining as subflow that which was previously regarded as groundwater.

b. As petitioners recognize (Pet. 29), this Court has never directly addressed the question whether a state court's deviation from previously applicable property law principles can effect a taking that requires the payment of just compensation. Cf. *Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints* v. *Hodel*, 830 F.2d 374, 381 (D.C. Cir. 1987) ("The question of whether courts, as opposed to legislative bodies, can ever 'take' property in violation of the Fifth Amendment is an interesting and by no means a settled issue of law."), cert. denied, 486 U.S. 1015 (1988). The instant case does not provide an appropriate vehicle for resolving that question. Petitioners acknowledge (Pet. 28) that the Arizona Supreme Court in this case did not disavow any of its prior holdings, but instead articulated its decision as an application of existing precedents. As we explain below (pp. 14-16, *infra*), the state court's decision reflects a reasonable interpretation of that court's prior holdings. But in any event, this Court could reach the question "whether a radical departure by a state court from its prior precedents may constitute a taking" (Pet. 29) only if it first compared the decision below to prior Arizona Supreme Court water law rulings and concluded that a "radical departure" had in fact occurred. The need for that antecedent state-law inquiry is itself a substantial reason for this Court to deny review.

For other reasons as well, this case provides a poor vehicle for consideration of the federal question. As we have explained above (pp. 8-10, *supra*), the Arizona Supreme Court's decision is an interlocutory ruling that does not purport to quantify the water rights of any claimant. Because the decision does not resolve the claims either of petitioners or of any competing claimants, it cannot plausibly be thought to effect a taking

of any property in groundwater warranting an immediate federal remedy.[5] There is also a serious question whether any property could have been taken "for public use," within the meaning of the Fifth Amendment, by a judicial opinion that will be used not to arrogate property to the State, but instead as an articulation of legal principles to help in resolving the competing claims of parties to the use of water resources. See *Williams* v. *Adkinson*, 792 F. Supp. 755, 764 n.15 (M.D. Ala. 1992) (declining to find a judicial taking where the claim was that a state court improperly gave one party's property to another private party), aff'd, 987 F.2d 774 (11th Cir. 1993); *Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints* v. *Hodel*, 637 F. Supp. 1398, 1406-1407 (D.D.C. 1986) (same), aff'd, 830 F.2d 374 (D.C. Cir. 1987), cert. denied, 486 U.S. 1015 (1988).

c. In any event, the Arizona Supreme Court's decision in this case effected no radical departure from that court's earlier decisions. Petitioners emphasize that, under the Arizona Supreme Court's seminal decision in *Southwest Cotton*, the category of subflow should be "narrow" and should "[i]n almost all cases * * * [be] found within, or immediately adjacent to, the bed of the surface stream itself." Pet. 11 (quoting *Southwest Cotton*, 4 P.2d at 380-381) (petitioners' emphasis removed). But petitioners' description of *Southwest Cotton* omits the most relevant portion of that

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[5] Although petitioners contend (Pet. 26) that the Arizona Supreme Court's decision "must be subjected to an *ad hoc* factual inquiry to determine whether it has interfered with reasonable, distinct, investment-backed expectations regarding property interests in percolating groundwater," the current record before this Court is plainly insufficient to conduct such an inquiry.

decision: the test for determining what is subflow. As the Arizona Supreme Court recognized in *Gila River II*, *Southwest Cotton* established the following rule:

> *Does drawing off the subsurface water tend to diminish appreciably and directly the flow of the surface stream?* If it does, it is subflow, and subject to the same rules of appropriation as the surface stream itself; if it does not, then, although it may originally come from the waters of such stream, it is not, strictly speaking, a part thereof, but is subject to the rules applying to percolating waters.

Pet. App. C13-C14 (quoting *Southwest Cotton*, 4 P.2d at 380-381). Petitioners do not mention that test, let alone explain how the Arizona Supreme Court's approval of the "saturated floodplain Holocene alluvium" as the subflow zone was inconsistent with it.

As the Arizona Supreme Court recognized in *Gila River II*, the decision in *Southwest Cotton* left certain "ambiguities and uncertainties" and "did not create an all-encompassing set of common law principles." Pet. App. C17, C25. Thus, while the court in *Gila River II* did not "redraw or erase th[e] line" drawn in *Southwest Cotton*, it refined the "direct and appreciable diminution" test to refer to criteria such as elevation, gradient, chemical makeup, and flow direction. *Id.* at C17, C24-C25. The superior court considered those criteria in adopting the "saturated floodplain Holocene alluvium" as the subflow zone. See *id.* at B54-B58. Petitioners do not contend that the trial court misapplied those factors.

Petitioners do argue that the subflow zone ultimately adopted by the superior court is inconsistent with the Arizona Supreme Court's rejection in *Gila River II*—a prior interlocutory decision in this same general

stream adjudication—of the "50%/90 day" test that the superior court had previously fashioned. They contend that the "saturated floodplain Holocene alluvium" is equivalent to the "younger alluvium," and that the Arizona Supreme Court in *Gila River II* rejected that zone as overly broad. Pet. 13 (quoting Pet. App. C26). As the passage quoted by petitioners indicates, however, the *Gila River II* court rejected the "50%/90 day" test not because of its potential breadth, but because it was arbitrary and because the superior court had failed to explain how the test comported with "the tests laid down in *Southwest Cotton*." Pet. 13 (quoting Pet. App. C26); see also Pet. App. A23 ("Our dissatisfaction with the 50%/90 day test in *Gila River II* stemmed largely from its arbitrary volume and time components, contrary to *Southwest Cotton*'s mandate."). In any event, any inconsistency between two interlocutory rulings of the same state court in the same case prior to final judgment is for that court to resolve. It presents no basis for review by this Court, especially at this stage, much less the sort of startling departure from *settled* rights or expectations that would give rise to a claim under the Just Compensation Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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